

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SAMUEL A. DUBYAK,) Case No. EDCV 10-647-VBF (DTB)
Petitioner,)
vs.) ORDER DISMISSING PETITION WITH
BEN CURRY,) LEAVE TO AMEND
Respondent.)

On or about August 26, 2009, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody herein in the Northern District of California. On April 27, 2010, the matter was transferred to this Court and the Petition was filed in the Central District of California on April 30, 2010. Attached to the Petition are various documents, letters, newspaper articles and a “statement of the case” (collectively “Pet. Att.”). Petitioner alleges that he was convicted in 1987 of first degree murder with a gun use enhancement, pursuant to California Penal Code §§ 187 and 12022.5, following a jury trial, and that he was sentenced to prison for 25 years-to-life, plus two years. (Petition at 3). Insofar as the Court can glean, petitioner appears to allege that the trial court committed error through the admission of evidence relating to the testing of bullet fragments apparently connecting petitioner with the murder. (See, e.g., Pet. Att. at 4.) Petitioner’s claims are not specifically set

1 forth in the Petition. Instead, petitioner makes reference to the Pet. Att. for the basis
 2 of his federal habeas claims (see Petition at 6-7.) The Court's review of the Petition
 3 reveals that it suffers from the following deficiencies:

4 1. The Petition has not been submitted on either the national form
 5 appended to the Habeas Rules, or the form approved and supplied for habeas
 6 petitions by the Central District of California. See Rule 2(d) of the Rules
 7 Governing Section 2254 Cases in the United States District Courts (authorizing
 8 the District Court by Local Rule to require that habeas petitions be filed in a
 9 form prescribed by the Local Rule); see also Central District Local Rule 83-
 10 16.1.

11 2. Under 28 U.S.C. § 2254(b), habeas relief may not be
 12 granted unless petitioner has exhausted the remedies available in the
 13 courts of the State.¹ Exhaustion requires that the prisoner's contentions
 14 be fairly presented to the state courts, and be disposed of on the merits
 15 by the highest court of the state. See James v. Borg, 24 F.3d 20, 24 (9th
 16 Cir. 1994); Carothers v. Rhay, 594 F.2d 225, 228 (9th Cir. 1979).
 17 Moreover, a claim has not been fairly presented unless the prisoner has
 18 described in the state court proceedings both the operative facts and the
 19 federal legal theory on which his claim is based. See Duncan v. Henry,
 20 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995); Picard
 21 v. Connor, 404 U.S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971).
 22 As a matter of comity, a federal court will not entertain a habeas corpus

23

24 1 The habeas statute now explicitly provides that a habeas petition brought
 25 by a person in state custody "shall not be granted unless it appears that-- (A) the
 26 applicant has exhausted the remedies available in the courts of the State; or (B)(i)
 27 there is an absence of available State corrective process; or (ii) circumstances exist
 28 that render such process ineffective to protect the rights of the applicant." 28 U.S.C.
 § 2254(b)(1).

1 petition unless the petitioner has exhausted the available state judicial
2 remedies on every ground presented in the petition. See Rose v. Lundy,
3 455 U.S. 509, 518-22, 102 S. Ct. 1198, 71 L. Ed. 2d 179 (1982).
4 Petitioner has the burden of demonstrating that he has exhausted
5 available state remedies. See, e.g., Brown v. Cuyler, 669 F.2d 155, 158
6 (3d Cir. 1982). Here, the Petition is silent as to what specific claims
7 petitioner is raising, and whether such claims have been exhausted before
8 the California Supreme Court. The Court is unable to determine from
9 the face of the Petition whether petitioner has met his burden of
10 demonstrating that he has exhausted his state remedies with respect to
11 each of the grounds for relief that he is purporting to allege herein.

12 3. The Petition fails to set forth the specific grounds for relief,
13 as well as the facts supporting each ground. Moreover, the Petition is
14 not signed by the petitioner under penalty of perjury. See Rule
15 2(c)(1),(2) and (5) of the Rules Governing Section 2254 Cases in the
16 United States District Courts.

17
18 For the foregoing reasons, the Petition is dismissed with leave to amend. If
19 petitioner desires to pursue this action, he is ORDERED to file an amended petition
20 rectifying the deficiencies discussed above within thirty (30) days of the date of this
21 Order. The clerk is directed to send petitioner a blank Central District habeas petition
22 form for this purpose.

23 The amended petition should reflect the same case number, be clearly labeled
24 “First Amended Petition,” and be filled out completely. In ¶ 7 of the First Amended
25 Petition, petitioner should specify **separately and concisely** each federal
26 constitutional claim that he seeks to raise herein and answer all of the questions
27 pertaining to each such claim. (If petitioner attaches a supporting memorandum of
28 points and authorities, the arguments therein should correspond to the claims listed in

¶ 7 of the habeas petition form and not include any additional claims.) If petitioner contends that he exhausted his state remedies in a Petition for Review to the California Supreme Court, he should list such filing in ¶ 4 of the habeas petition form and provide all of the other called for information. If petitioner contends that he exhausted his state remedies in a habeas petition to the California Supreme Court, he should list such filing in ¶ 6 of the habeas petition form and provide all of the other called for information. For each filing listed in ¶¶ 4 and 6, petitioner should be sure to specify all of the grounds raised by him in such filing, along with the case number, the date of decision, and the result.

As the Petition challenges petitioner's underlying conviction from 1987, there is a strong likelihood that it may be time-barred by the one-year statute of limitations period for habeas petitions prescribed by the Antiterrorism and Effective Death Penalty Act of 1996. However, until petitioner cures the deficiencies set forth above, the Court is unable to adequately analyze the timeliness of the Petition.

Finally, petitioner is cautioned that his failure to timely file a First Amended Petition in compliance with this Order will result in a recommendation that the action be dismissed without prejudice for failure to prosecute.

DATED: June 1, 2010



DAVID T. BRISTOW
UNITED STATES MAGISTRATE JUDGE

NAME _____

PRISON IDENTIFICATION/BOOKING NO. _____

ADDRESS OR PLACE OF CONFINEMENT _____

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FULL NAME (*Include name under which you were convicted*) _____

Petitioner,

v.

NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED PERSON HAVING CUSTODY OF PETITIONER

Respondent.

CASE NUMBER: _____

CV _____

To be supplied by the Clerk of the United States District Court

 AMENDED

**PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY**

28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION _____

PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT
(*List by case number*)

CV _____

CV _____

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
6. You must pay a fee of \$5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds \$25.00, you must pay the filing fee.
7. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
 United States Courthouse
 ATTN: Intake/Docket Section
 312 North Spring Street
 Los Angeles, California 90012

PLEASE COMPLETE THE FOLLOWING: (*Check appropriate number*)

This petition concerns:

1. a conviction and/or sentence.
2. prison discipline.
3. a parole problem.
4. other.

PETITION

1. Venue

- a. Place of detention _____
- b. Place of conviction and sentence _____

2. Conviction on which the petition is based (*a separate petition must be filed for each conviction being attacked*).

- a. Nature of offenses involved (*include all counts*):

- b. Penal or other code section or sections:

- c. Case number: _____

- d. Date of conviction: _____

- e. Date of sentence: _____

- f. Length of sentence on each count:

- g. Plea (*check one*):

Not guilty

Guilty

Nolo contendere

- h. Kind of trial (*check one*):

Jury

Judge only

3. Did you appeal to the California Court of Appeal from the judgment of conviction? Yes No

If so, give the following information for your appeal (*and attach a copy of the Court of Appeal decision if available*):

- a. Case number: _____

- b. Grounds raised (*list each*):

- (1) _____

(2) _____
(3) _____
(4) _____
(5) _____
(6) _____

c. Date of decision: _____
d. Result _____

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? Yes No

If so give the following information (*and attach copies of the Petition for Review and the Supreme Court ruling if available*):

a. Case number: _____
b. Grounds raised (*list each*):
(1) _____
(2) _____
(3) _____
(4) _____
(5) _____
(6) _____
c. Date of decision: _____
d. Result _____

5. If you did not appeal:

a. State your reasons _____

b. Did you seek permission to file a late appeal? Yes No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?

Yes No

If so, give the following information for each such petition (*use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available*):

a. (1) Name of court: _____

(2) Case number: _____

(3) Date filed (*or if mailed, the date the petition was turned over to the prison authorities for mailing*): _____

(4) Grounds raised (*list each*):

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? Yes No

b. (1) Name of court: _____

(2) Case number: _____

(3) Date filed (*or if mailed, the date the petition was turned over to the prison authorities for mailing*): _____

(4) Grounds raised (*list each*):

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? Yes No

c. (1) Name of court: _____

(2) Case number: _____

(3) Date filed (*or if mailed, the date the petition was turned over to the prison authorities for mailing*): _____

(4) Grounds raised (*list each*):

(a) _____

(b) _____

(c) _____
(d) _____
(e) _____
(f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? Yes No

7. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement:* In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

a. Ground one: _____

(1) Supporting FACTS: _____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? Yes No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? Yes No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? Yes No

b. Ground two: _____

(1) Supporting FACTS: _____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? Yes No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? Yes No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? Yes No

c. Ground three: _____

(1) Supporting FACTS: _____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? Yes No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? Yes No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? Yes No

d. Ground four: _____

(1) Supporting FACTS: _____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? Yes No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? Yes No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? Yes No

e. Ground five: _____

(1) Supporting FACTS: _____

(2) Did you raise this claim on direct appeal to the California Court of Appeal? Yes No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? Yes No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? Yes No

8. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: _____

9. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?

Yes No

If so, give the following information for each such petition (*use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available*):

a. (1) Name of court: _____

(2) Case number: _____

(3) Date filed (*or if mailed, the date the petition was turned over to the prison authorities for mailing*): _____

(4) Grounds raised (*list each*):

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? Yes No

b. (1) Name of court: _____

(2) Case number: _____

(3) Date filed (*or if mailed, the date the petition was turned over to the prison authorities for mailing*): _____

(4) Grounds raised (*list each*):

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: _____

(6) Result _____

(7) Was an evidentiary hearing held? Yes No

10. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? Yes No

If so, give the following information (*and attach a copy of the petition if available*):

(1) Name of court: _____

(2) Case number: _____

(3) Date filed (*or if mailed, the date the petition was turned over to the prison authorities for mailing*): _____

(4) Grounds raised (*list each*):

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

11. Are you presently represented by counsel? Yes No

If so, provide name, address and telephone number: _____

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding,

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on _____

Date

Signature of Petitioner

Petitioner

**DECLARATION IN SUPPORT
OF REQUEST
TO PROCEED
IN FORMA PAUPERIS**

Respondent(s)

I, _____, declare that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to relief.

1. Are you presently employed? Yes No

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer. _____

b. If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received. _____

2. Have you received, within the past twelve months, any money from any of the following sources?

a. Business, profession or form of self-employment? Yes No

b. Rent payments, interest or dividends? Yes No

c. Pensions, annuities or life insurance payments? Yes No

d. Gifts or inheritances? Yes No

e. Any other sources? Yes No

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months: _____

3. Do you own any cash, or do you have money in a checking or savings account? (Include any funds in prison accounts)

Yes No

If the answer is yes, state the total value of the items owned: _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property? (Excluding ordinary household furnishings and clothing) Yes No

If the answer is yes, describe the property and state its approximate value: _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support: _____

I, declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct.

Executed on _____
Date

Signature of Petitioner

CERTIFICATE

I hereby certify that the Petitioner herein has the sum of \$ _____ on account to his credit at the _____ institution where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said institution: _____

Date

Authorized Officer of Institution/Title of Officer